FOR ARGUMENT

No. 89-1436

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

R. ENTERPRISES, INC., and
MFR COURT STREET BOOKS, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Cases: Page

Constitution and rule: Page

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This case concerns the appropriate legal standard for quashing a grand jury subpoena for corporate records. Construing Rule 17(c) of the Federal Rules of Criminal Procedure, the court of appeals held that before the government may enforce compliance with such a subpoena, it must establish that the requested materials would be "relevan[t]" and "admissible as evidence at trial." Pet. App. 10a. The court emphasized that unless grand jury subpoenas are held to such a strict threshold standard, they might be used as "a means of discovery in addition to that pro-

vided by Fed. R. Crim. Pro. 16." *Id.* at 9a. Applying that standard, the court quashed the subpoenas for respondents' corporate records. It concluded that the subpoenaed materials "would most likely be inadmissible on relevancy grounds at any trial that might occur," and that the records would therefore "fail to meet the requirement[] that any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial." *Id.* at 10a.

1. We restate the court of appeals' decision because respondents evidently have no desire to defend it on its own terms. Instead, respondents and amicus curiae PHE, Inc., recast the court's decision in terms they find more acceptable, and then defend that new decision on grounds the court of appeals never addressed.

For example, both respondents and PHE expressly disavow the court of appeals' insistence that materials subpoenaed by the grand jury first be found relevant and admissible at trial. "Of course," respondents declare (Br. 37), " 'relevance,' in the context of a grand jury investigation, is not probative relevancy, but rather it is measured by a less exacting standard." PHE makes the same point, conceding (Amicus Br. 16 n.14) that it "does not advocate the adoption of a strict rule of admissibility regarding material subpoenaed by a federal grand jury." As we explained in our opening brief (at 9-11), those concessions are amply justified: the court of appeals' decision—holding the grand jury to the same standards of relevance and admissibility that apply at trial —cannot be squared with this Court's consistent recognition that the operation of the grand jury "generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal

trials." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974).

Rather than defend the court's ruling, respondents and PHE simply wish the opinion away. In respondents' view, the discussion about admissibility at trial was merely "an added thought" (Br. 48), while in PHE's words, "this statement—whatever its meaning—is merely dictum" (Amicus Br. 15). But the court of appeals did not have so modest a view of its own decision. Extrapolating (Pet. App. 6a) from a portion of *United States* v. *Nixon*, 418 U.S. 683, 699 (1974), which required that documents subpoenaed *for trial* be found "evidentiary and relevant (footnote omitted)," the court of appeals stated, quite plainly, that any documents subpoenaed by the grand jury under Rule 17(c) must likewise "be admissible as evidence at trial." Pet. App. 10a.[1] The court then applied that rule in deciding to quash the subpoenas in this case, finding that the subpoenaed materials "would most likely be inadmissible on relevancy grounds at any trial that might occur." *Ibid.* Respondents and their amicus appear to agree with us that the court's ruling, at least to that extent, cannot be sustained.

2. In place of the court of appeals' standard, we urged in our opening brief (at 13-21) that the Court adopt the rule that has been adopted by a majority of the courts of appeals. Under that rule, the recipient must carry the burden of showing that the subpoenaed materials bear "no conceivable relevance to any legitimate object of investigation by the federal

[1] The court of appeals recognized that the *Nixon* Court was reviewing a trial subpoena, not a grand jury subpoena, but it found the "interpretation of Rule 17(c)" articulated in the *Nixon* case "equally applicable in this case." Pet. App. 7a n.2.

grand jury." *In re Liberatore*, 574 F.2d 78, 83 (2d Cir. 1978). We explained that imposing that burden on the recipient (1) is consistent with the usual rules for assigning burdens of proof, (2) gives force to the presumption of grand jury regularity, and (3) diminishes the occasions on which grand jury proceedings will be interrupted by "minitrials and preliminary showings." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973). We also observed that the "no conceivable relevance" standard of proof accords with this Court's recognition that the scope of a grand jury's inquiry should not be "limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair* v. *United States*, 250 U.S. 273, 282 (1919).

Respondents and PHE agree that the subpoena recipient should be required to bear at least a threshold burden to challenge the relevance of the subpoenaed material.[2] But they urge this Court to adopt a less

[2] Surprisingly, both respondents (Br. 10, 36 n.24) and PHE (Br. 9) contend that the court of appeals actually imposed such a threshold burden on the subpoena recipients. As respondents read the opinion, the court of appeals "was careful to point out that the obligation of the Government to demonstrate relevance only becomes operative *after* the recipient of the subpoena shows that the records sought are not relevant to the grand jury's investigation." Resp. Br. 10. PHE is more candid, acknowledging that the court of appeals "did not explain when the government's obligation to demonstrate some relevance is triggered." PHE Br. 9. PHE nevertheless insists that the court's "actual holding demonstrates that this obligation arises only *after* the recipient of the subpoena makes a substantial showing that the material sought is not relevant to a legitimate grand jury investigation." *Ibid.*

As PHE properly concedes, the court of appeals did not expressly require respondents to make a threshold showing of

exacting standard of proof. In respondents' view, the recipient should be required simply to "make a 'reasonable' showing that the records sought are not relevant to the grand jury investigation." Resp. Br. 42. PHE offers a somewhat more rigorous approach, under which the recipient would have to make a showing (possibly "a substantial showing" (Amicus Br. 9)) that "it is unlikely that the materials sought are relevant to the investigation" (Amicus Br. 13). At that point, it is said, the burden should shift to the government to make either a " 'reasonable' showing" (Resp. Br. 38) or at least a "minimal showing" (PHE Amicus Br. 12) of relevance to the investigation.

These proposals are blueprints for grand jury delay. Under respondents' proposed standard, a subpoena recipient need make only a "reasonable" showing of irrelevance. Such an open-ended rule would invite motions to quash grand jury subpoenas, since it takes little imagination to assert a facially "reasonable" objection on relevance grounds. The trial court would then be required to assess the "reasonableness" of the recipient's objection, presumably by examining the subpoenaed material and evaluating the connection between that material and the underlying investigation. Rule 17(c) hearings would swiftly be converted into lengthy, factual inquiries, focusing on the nature of secret grand jury proceed-

irrelevance—let alone "a substantial showing" of irrelevance (PHE Br. 9). To the contrary, as we read its opinion, the court of appeals imposed the threshold burden squarely on the government: "The government must offer some evidence of a connection between MFR and R. Enterprises and Virginia *before it can subpoena* the companies' business records under 17(c)." Pet. App. 9a (emphasis added).

ings, and the reasonableness of a request for evidence.[3]

By contrast, the "no conceivable relevance" standard, which is well grounded in circuit court precedent (see Pet. Br. 14-16), is designed to limit Rule 17(c) motions to instances of genuine grand jury abuse. Unless a subpoena recipient can show that there is

[3] Respondents' proposed "reasonableness" test recalls certain of this Court's early decisions forbidding administrative agencies from engaging in "fishing expeditions" when issuing subpoenas for records. Those decisions, however, are no longer good law, even in the administrative subpoena context. As Justice Jackson explained for a unanimous Court in *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), "early in the history of the federal administrative tribunal, the courts were persuaded to engraft judicial limitations upon the administrative process. * * * Administrative investigations fell before the colorful and nostalgic slogan 'no fishing expeditions.'" 338 U.S. at 642. "More recent views," he noted, "have been more tolerant of [the administrative process] than those which underlay many older decisions." *Ibid.* Applying that "more tolerant" approach, and expressly analogizing the administrative process to the grand jury (*ibid.*), Justice Jackson stated: "Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." *Id.* at 652.

Respondents also claim that their "reasonableness" test will "deter prosecutorial overzealousness" and "preserve[] the integrity of the grand jury process." Resp. Br. 45. But in cases of genuine grand jury abuse, there are several available remedies other than interrupting the grand jury process—including contempt, disciplinary proceedings, and criticism in published opinions. *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 263 (1988). Each of those remedies "allow[s] the court to focus on the culpable individual" (*ibid.*), without requiring the investigative process to grind to a halt.

no conceivable basis for the request, it must comply (absent a privilege). Trial courts need not interrupt the grand jury process with lengthy, free-wheeling "relevance" hearings. And as we showed in our opening brief, the "no conceivable relevance" standard comports with both the language and the legislative history of Rule 17(c), which respondents do not address.

3. Respondents contend that they made a sufficient showing that the subpoenaed documents are irrelevant to the grand jury's investigation. Respondents claim that they met their burden by asserting, in affidavits, that neither of them did any business in Virginia.

As we explained in our opening brief (at 30-32), that allegation does not render the subpoenaed records irrelevant to the grand jury investigation. First, the grand jury was not required to accept respondents' assertions on faith, but was instead entitled to determine the facts for itself. *United States* v. *Morton Salt Co.*, 338 U.S. at 642-643. Moreover, out-of-state acts may be relevant as evidence of knowledge or intent on the part of Model Magazine or its owner, Martin Rothstein (who *did* transact business in Virginia); they may tend to prove overt acts in a conspiracy based in Virginia; or they may constitute aiding and abetting the substantive acts of others within the jurisdiction. More generally, we explained (U.S. Br. 8), the subpoenaed records might shed light on the relationship between respondents and Model, companies that the trial court noted were "all the same thing." Pet. App. 60a. Because the subpoenaed materials would plainly be relevant on any or all of those grounds, respondents' showing was inadequate, even under their proposed standard of mere "reasonableness."

Respondents contend that we may not assert those "theories of relevance" because we did not advance them in the district court, and because it is not "known whether any of these theories was the actual basis for issuance of the subpoena." Resp. Br. 47. That contention is meritless.

First, the government did advance those theories of relevance in the district court. In response to the motions to quash, the prosecutor explained that the grand jury was investigating allegations that obscene materials had been shipped into Virginia (C.A. App. 99-100); that Model Magazine was engaged in "the sale of sexually explicit video tape cassettes, which the grand jury believes may be obscene" (*id.* at 100); that some of Model's sales had taken place in Virginia (*id.* at 93 & n.8); and that respondents R. Enterprises and MFR Court Street Books did business at the same location as Model, were owned by the same person (Martin Rothstein), and were "all one and the same" (*id.* at 397, 476, 524-525, 642). The prosecutor explained that the grand jury "want[ed] to go out and look further at Mr. Rothstein and his organization." *Id.* at 476. In particular, the prosecutor noted, the "grand jury should be able to determine" such issues as "the relationship between Model" and the respondents; whether "assets generated by Model have been used to run [respondents] or vice-versa"; and whether respondents were merely "subterfuge corporation[s]" designed by Model "to transact its business either directly or indirectly into the Eastern District of Virginia." *Id.* at 397. Even if, as respondents asserted, their own business dealings took place outside Virginia, that was not dispositive; as the prosecutor noted, "such concepts as conspiracy and the rules of evidence" entitle the grand jury to seek documents relating to out-of-state transactions. *Id.* at 269.

On that record, the district court correctly denied respondents' motions to quash. Rejecting R. Enterprises' motion, Judge Cacheris found a "sufficient connection" between the company and Virginia, noting Rothstein's admission that R. Enterprises, MFR, and Model were "all the same thing." Pet. App. 60a. Judge Ellis reached the same conclusion in denying MFR's motion to quash, finding that the three companies were "related entities," at least one of which "certainly did ship sexually explicit material into the Commonwealth of Virginia." *Id.* at 63a.

Moreover, it does not matter whether any of the theories of relevance that we put forth in our brief "was the actual basis for issuance of the subpoena." Resp. Br. 47. The principal reason for the "no conceivable relevance" standard is precisely because it cannot be known, until the close of an investigation, what "actual" relevance, if any, a given record will have. As this Court has explained many times, the grand jury "does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Morton Salt Co.*, 338 U.S. at 642-643. See also *United States* v. *Bisceglia*, 420 U.S. 141, 147-148 (1975); *United States* v. *Powell*, 379 U.S. 48, 57 (1964). The grand jury needs no "theory of relevance" in order to undertake an investigation, to pursue a lead, or to issue a subpoena. Accordingly, in deciding whether a subpoena recipient has discharged its burden of proving that the requested materials are irrelevant, a court cannot require the government to demonstrate that the grand jury actually had in mind the theory of relevance that is offered at the hearing. It is enough that the court can itself find that such a theory is available.

4. Respondents defend the court of appeals' decision on First Amendment grounds. They assert (Br. 12) that once a subpoena recipient makes "a prima facie showing of arguable First Amendment infringement," the government must then demonstrate that there is "a 'compelling state need' for the books and records sought and that they are 'substantially' related to the grand jury's investigation." Under this standard, respondents contend that the grand jury subpoenas for their corporate records were properly quashed.

We note at the outset that the court of appeals did not rely on First Amendment principles in quashing the subpoenas in this case. Indeed, the words "first amendment" do not appear in the relevant portions of the court's opinion. Rather, the court predicated its decision on a construction of Rule 17(c), holding that "any" record subpoenaed by the grand jury—whether or not related to First Amendment activity—"must be admissible as evidence at trial." Pet. App. 10a.

The court of appeals' reluctance to rely on First Amendment principles—even though respondents had argued the point below—was well founded. Creating a special rule of relevance for "records related to activities protected by the First Amendment" (Resp. Br. 15) is a process with no evident stopping point. If respondents—companies whose business involves the marketing of videotapes and other material—can shield their ordinary corporate records on First Amendment grounds, so too can any other company whose business involves, however tangentially, arguably protected material. A conglomerate which includes a book publishing division can, and undoubtedly will, make the same claim, if offered the special rule of relevance urged by respondents.

Moreover, there is no reason why respondents' novel standard of relevance would, or could, be limited to businesses asserting First Amendment protection. Any number of other interests—which likewise enjoy or could assert constitutional protection of one degree or another—could make similar assertions in response to a grand jury subpoena. Taken to the limits of its logic, respondents' standard might equally require the government to prove relevance when it subpoenas the records of minority-owned businesses, birth-control clinics, or the offices of state officials. As in *Branzburg* v. *Hayes*, 408 U.S. 665, 703 (1972), the Court should not "embark the judiciary on a long and difficult journey to * * * an uncertain destination."

In any event, for the reasons noted in our opening brief (at 27-30), First Amendment principles do not support the court of appeals' decision. As this Court explained in *Branzburg*, 408 U.S. at 682, "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[4] To the contrary, the Court has "held that generally applicable laws unconcerned with regulating speech that have the effect of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment." *Employment Div., Dep't of Human Resources* v. *Smith*,

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[4] Respondents cite *Branzburg* (Br. 17-18) in support of their compelling-interest test. In a footnote (Br. 18 n.10), however, respondents acknowledge that the Court did not actually adopt that test in *Branzburg*. Indeed, in its more recent decision in *University of Pennsylvania* v. *EEOC*, 110 S. Ct. 577 (1990), the Court, describing its holding in *Branzburg*, noted that it had "indicated a reluctance to recognize a constitutional privilege" in that case (*id.* at 588).

110 S. Ct. 1595, 1604 n.3 (1990) (emphasis omitted). That is particularly so where, as here, the government has not sought to obtain protected materials, but has sought only the ordinary corporate records of an entity whose business happens to involve the production of arguably protected merchandise.[5]

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[5] Respondents assert that "[i]t would be a serious insult to the scholarship of this Court to suggest that all the carefully constructed procedures governing the investigation of magazines and films somehow don't apply when dealing with corporate records essential for the distribution of the films." Br. 25-26. But this Court's decisions "have long recognized that the seizure of films or books on the basis of their content implicates First Amendment concerns not raised by other kinds of seizures." *New York* v. *P.J. Video, Inc.*, 475 U.S. 868, 873 (1986). For that reason, the Court has "required that certain special conditions be met before such seizures may be carried out." *Ibid.* Conversely, the Court has refused to devise specially strict standards for searches of ordinary corporate records, simply because the business in question happens to produce materials protected by the First Amendment. *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 563-567 (1978).

In support of their contrary view, respondents rely principally (Br. 25) on two 1972 opinions by Judge Edward Weinfeld. *G.I. Distributors, Inc.* v. *Murphy*, 336 F. Supp. 1036 (S.D.N.Y.); *Star Distributors, Ltd.* v. *Hogan*, 337 F. Supp. 1362 (S.D.N.Y.). In those cases, Judge Weinfeld concluded that seizures that had effectively deprived certain book publishers of all of their merchandise and records were constitutionally overbroad. Judge Weinfeld was, however, careful to distinguish the seizures at issue in those cases from such "less intrusive means of obtaining the evidence, such as the use of the subpoena power." *Star Distributors*, 337 F. Supp. at 1364. In any event, as respondents acknowledge in a footnote (Br. 26 n.21), the leading of the two cases, *G.I. Distributors*, was reversed by the court of appeals. *G.I. Distributors* v. *Murphy*, 469 F.2d 752 (2d Cir. 1972), vacated on other grounds, 413 U.S. 913, decision adhered to on remand, 490 F.2d 1167 (2d Cir. 1973).

This Court's recent decision in *University of Pennsylvania* v. *EEOC*, 110 S. Ct. 577 (1990), illustrates the point in a closely related context. In that case, the EEOC issued a subpoena seeking certain tenure-review files in the possession of the University of Pennsylvania. The University resisted compliance, in part on the ground that production of the materials would compromise their confidentiality, thereby inhibiting the University's First Amendment right to academic freedom. This Court unanimously rejected that contention and enforced the subpoena. The Court explained that "by comparison with the cases in which we have found a cognizable First Amendment claim, the infringement the University complains of is extremely attenuated." *Id.* at 587.[6] "Indeed," the Court added, "if the University's attenuated claim were accepted, many other generally applicable laws might also be said to infringe the First Amendment." *Id.* at 588. At bottom, the Court observed, the University asserted simply that compliance with the subpoenas would make the peer review process more difficult; "[b]ut many laws make the exercise of First Amendment rights more difficult." *Ibid.*[7] What is more, the Court added, the Univer-

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[6] In particular, the Court observed, the University "argues that the First Amendment is infringed by disclosure of peer review materials because disclosure undermines the confidentiality which is central to the peer review process, which in turn is the means by which petitioner seeks to exercise its asserted academic-freedom right of choosing who will teach." 110 S. Ct. at 587-588.

[7] "For example," the Court noted, "a university cannot claim a First Amendment violation simply because it may be subject to taxation or other government regulation, even though such regulation might deprive the university of revenue it needs to bid for professors who are contemplating work-

sity's First Amendment claim was "speculative," since the subpoenas might have little, if any, actual impact on the peer review process. "Thus," the Court stated, "the 'chilling effect' petitioner fears is at most only incrementally worsened by the absence of a privilege." *Ibid.* Relying on *Branzburg* for the general proposition that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability" (*ibid.*), the Court enforced the subpoenas without requiring the government to make any special showing of need.

Respondents' First Amendment claim fails for the same reasons. First, the infringement claimed in this case "is extremely attenuated." *University of Pennsylvania*, 110 S. Ct. at 587. Respondents complain that "[o]nce suppliers know that a customer is under criminal investigation, they will understandably be reluctant to ship merchandise, recognizing that they may be exposing themselves to a far-off criminal investigation." Br. 12. Presumably, respondents believe that the existence of the investigation will become widely known, thereby discouraging suppliers from doing business with respondents, and in turn preventing respondents from engaging in First Amendment activity.

"To verbalize th[at] claim is to recognize how distant the burden is from the asserted right." *University of Pennsylvania*, 110 S. Ct. at 588. Like the University, respondents contend simply that the subpoenas in this case may make their business more difficult to conduct. But virtually any aspect of the criminal process may have such an effect. If, as respondents urge, the First Amendment is infringed by the very fact that "a customer is under criminal investigation" (Br. 12), the government would be required to meet the compelling-interest test not only when it issues a grand jury subpoena, but also when it opens an investigation, interviews a witness, or conducts informal discovery. In each instance, a supplier may learn that its customer is under investigation; yet it would be wholly impracticable to require the government to make a compelling-interest showing before it may undertake such routine investigative measures.

ing for other academic institutions or in industry." 110 S. Ct. at 588.

Respondents' First Amendment theory is also highly "speculative." *University of Pennsylvania*, 110 S. Ct. at 588. Whether, and to what extent, suppliers would react as respondents predict depends, first and foremost, on the suppliers' knowledge of the underlying investigation. Grand jury secrecy rules may be expected to limit any publicity surrounding the investigation. Compare *Branzburg* v. *Hayes*, 408 U.S. at 700 (grand jury secrecy "is a further protection against the undue invasion of [First Amendment] rights"), with *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 97-98 n.14 (1982) (public records of contributors and recipients of campaign funds); *Shelton* v. *Tucker*, 364 U.S. 479, 486 & n.7 (1960) (public exposure of associations of school teachers); *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 765-767 (1986) (public exposure of details of abortions). Moreover, the use of a subpoena, rather than a search warrant, to secure the requested materials should reduce both the intrusiveness of the investigation and any attendant publicity. See *United States* v. *Miller*, 425 U.S. 435, 446 n.8 (1976); *United States* v. *Dionisio*, 410 U.S. at 9-12. And even if the

investigation becomes public, suppliers may not uniformly elect to withhold their business; indeed, respondents do not point to any suppliers that have withdrawn their business as a result of this investigation. See *University of Pennsylvania*, 110 S. Ct. at 588 (quoting *Branzburg*, 408 U.S. at 693) (the Court is "reluctan[t] to recognize a constitutional privilege where it was unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury").[8]

* * * * *

The decision of the court of appeals threatens to "saddle [the] grand jury with minitrials and preliminary showings" that will "assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973). The history of this case provides an excellent illustration of that danger. The subpoenas to R. Enterprises and MFR Court Street Books were first issued in April 1988. Nearly two and one-half years later, respondents have yet to produce the required documents. The court of appeals' decision strongly encourages such delaying tactics, and should be reversed.

Respectfully submitted.

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SEPTEMBER 1990

[8] In this respect, among others, respondents' First Amendment claim differs from the free association claim successfully pressed in *NAACP* v. *Alabama*, 357 U.S. 449 (1958). In that case, the Court invalidated the compelled disclosure of the NAACP's membership lists, concluding that the production order "entail[ed] the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." *Id.* at 462. The Court noted that the organization had made "an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Ibid.* See also, *e.g.*, *Gibson* v. *Florida Legislative Investigation Comm.*, 372 U.S. 539, 549 (1963) (compelled disclosure of membership lists "will seriously inhibit or impair the exercise of constitutional rights").

By contrast, respondents simply assert, without apparent support, that the mere initiation of a criminal investigation will coerce their suppliers into withdrawing patronage. But "[b]are allegations of possible first amendment violations are insufficient to justify judicial intervention into a pending investigation." *Dole* v. *Milonas*, 889 F.2d 885, 891 (9th Cir. 1989).

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